

(3) In the event that notice is provided after the initiation of an action, the written description shall also include the following, in addition to the information described in paragraph (c)(1) of this section:

(i) A brief description of any proceeding that occurred as a result of the initiation of the action, including any orders issued by a court or other body;

(ii) Any case number, matter number, or designation assigned to the action; and

(iii) Information on scheduled court or other administrative or regulatory proceedings.

(4) In the event that notice is provided after the initiation of an action, in addition to the requirements set forth in paragraph (c)(3) of this section, the notice shall further include a complete, unredacted copy of any document filed by any party in relation to the action and any orders issued by the court or other body.

(5) If the State Official, after providing the notice described in paragraphs (c)(1) and (c)(2) of this section, intends to file a complaint, motion for relief, or similar document that is materially different from the document included with the notice, the State Official shall provide a copy of that document prior to filing, in accordance with the method described in paragraph (a)(2) of this section.

(d) *Bureau response.* In any action described in paragraphs (a) and (b) of this section, the Bureau may:

(1) Intervene in the action as a party;

(2) Upon intervening,

(i) Remove the action to the appropriate United States district court, if the action was not originally brought there; and

(ii) Be heard on all matters arising in the action;

(3) Appeal any order or judgment, to the same extent as any other party in the proceeding may; and

(4) Otherwise participate in the action as appropriate.

(e) *Confidentiality and privilege.* (1) The information described in paragraph (c) of this section, including the complaint, motion for relief, or other document, as well as the fact that notice has been provided, shall be subject to any limitations on disclosure im-

posed by the State Official pursuant to paragraph (c)(1)(viii) of this section; provided, however, that the recipient may disclose such information:

(i) As required by law;

(ii) When the information is or becomes publicly available;

(iii) With the consent of the State Official; or

(iv) To another State or Federal government entity when necessary to protect the public interest, after consultation with the State Official who provided the notice.

(2) Provision of notice by a State Official and disclosure of information pursuant to paragraph (e)(1) of this section shall not be deemed a waiver of any applicable privilege.

(f) *No private right of action or defense.* The requirements set forth in this section are not intended to, do not, and may not be relied upon to create any right, benefit, or defense, substantive or procedural, enforceable at law by a party against the United States or any State enforcing the provisions of the Dodd-Frank Act or any regulation prescribed thereunder.

PART 1090—DEFINING LARGER PARTICIPANTS OF CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

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AUTHORITY: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(a)(2); 12 U.S.C. 5514(b)(7)(A); and 12 U.S.C. 5512(b)(1).

SOURCE: 77 FR 42898, July 20, 2012, unless otherwise noted.

Subpart A—General

§ 1090.100 Scope and purpose.

This part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to 12 U.S.C. 5514(a)(1)(B) and (a)(2). A larger participant of a market covered by this part is subject to the supervisory authority of the Bureau under 12 U.S.C. 5514. This part also establishes rules to facilitate the Bureau's supervision of such larger participants pursuant to 12 U.S.C. 5514(b)(7).

§ 1090.101 Definitions.

For the purposes of this part, the following definitions apply:

Affiliated company means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person.

(1) For purposes of this definition “company” means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.

(2) A person has control over another person if:

(i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person;

(ii) The person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or

(iii) The person directly or indirectly exercises a controlling influence over the management or policies of the other person.

Assistant Director means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. The Director of the Bureau may perform the functions of the Assistant Director under this part. In the event there is no such Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to fulfill the duties of the Assistant Director under this part.

Bureau means the Bureau of Consumer Financial Protection.

Completed fiscal year means a tax year including any fiscal year, calendar year, or short tax year. “Fiscal year,” “calendar year,” “tax year,” and “short tax year” have the meanings attributed to them by the IRS as set forth in IRS Publication 538, which provides that:

(1) A “fiscal year” is 12 consecutive months ending on the last day of any month except December 31.

(2) A “calendar year” is 12 consecutive months ending on December 31.

(3) A “tax year” is an annual accounting period for keeping records and reporting income and expenses, or, if appropriate, a short tax year. An annual accounting period does not include a short tax year.

(4) A “short tax year” is a tax year of less than 12 months.

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service means any financial product or service, as defined in 12 U.S.C. 5481(15), that is described in one or more categories under:

(1) 12 U.S.C. 5481(15)(A) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in paragraph (1) of this definition.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Larger participant means a nonbank covered person that has met a test under subpart B of this part within the period provided in § 1090.102 of this part.

Nonbank covered person means, except for persons described in 12 U.S.C. 5515(a) and 5516(a):

(1) Any person that engages in offering or providing a consumer financial product or service; and

(2) Any affiliate of a person that engages in offering or providing a consumer product or service if such affiliate acts as a service provider to such person.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Supervision and supervisory activity mean the Bureau's exercise, or intended exercise, of supervisory authority, including by initiating or undertaking an examination, or requiring a report of a person, pursuant to 12 U.S.C. 5514.

§ 1090.102 Status as larger participant subject to supervision.

A person qualifying as a larger participant under subpart B of this part shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under subpart B.

§ 1090.103 Assessing status as a larger participant.

(a) If a person receives a written communication from the Bureau initiating a supervisory activity pursuant to 12 U.S.C. 5514, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by this part within 45 days of the date of the communication. Such response must be sent to the Assistant Director by electronic transmission at the address included in the communication and must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market covered by this part and therefore is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514. In addition, a person may include with the response copies of any records, documents, or other information on which the person relied in making the assertion.

(b) A person shall be deemed to have waived the opportunity, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under paragraph (a) of this section. A person who fails to respond to the Bureau's written communication within 45 days will be

deemed to have acknowledged that it is a larger participant.

(c) The Assistant Director shall review the affidavit, any attached records, documents, or other information submitted pursuant to paragraph (a) of this section, and any other information the Assistant Director deems relevant, and thereafter send by electronic transmission to the person a statement explaining whether the person meets the definition for a larger participant of a market covered by this part.

(d) At any time, including prior to issuing the written communication referred to in paragraph (a) of this section, the Assistant Director may require that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate to assess whether a person qualifies as a larger participant. Persons must provide the requisite records, documents, and other information to the Bureau within the time period specified in the request.

(e) The Assistant Director, in her or his discretion, may modify any time-frame prescribed by this section on her or his own initiative or for good cause shown.

Subpart B—Markets

§ 1090.104 Consumer Reporting Market.

(a) *Market-Related definitions.*

Annual receipts means receipts calculated as follows:

(i) *Receipts* means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the entity or its employees; and amounts collected for

another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(ii) *Period of measurement.* (A) Annual receipts of a person that has been in business for three or more completed fiscal years means the total receipts of the person over its three most recently completed fiscal years divided by three.

(B) Annual receipts of a person that has been in business for less than three completed fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(C) Where a person has been in business for three or more completed fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal or calendar years divided by the total number of weeks in the short year and the two full fiscal or calendar years, multiplied by 52.

(iii) *Annual receipts of affiliated companies.* (A) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(B) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts of the person and the affiliated company are aggregated for the entire period of measurement (not just the period after the affiliation arose).

(C) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (ii) of this definition even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with paragraph (ii)(B) of this definition even if

the person has been in business for three or more completed fiscal years.

(D) The annual receipts of a formerly affiliated company are not included if affiliation ceased before the applicable period of measurement as set forth in paragraph (ii) of this definition. This exclusion of annual receipts of formerly affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

Consumer reporting means:

(i) *In general.* Consumer reporting means collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service.

(ii) *Exclusion for transaction and experience information.* Consumer reporting does not include the activities of a person to the extent that a person collects, analyzes, maintains, or provides information that relates solely to the person's transactions or experiences with consumers.

(iii) *Exclusion for furnishing affiliate information to a consumer reporting entity.* Consumer reporting does not include the activities of a person to the extent that a person provides information that solely relates to transactions or experiences between a consumer and an affiliate of such person to another person that is engaged in consumer reporting.

(iv) *Exclusion for certain authorizations or approvals.* Consumer reporting does not include any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.

(v) *Exclusion for providing information to be used solely in a decision regarding employment, government licensing, or residential leasing or tenancy.* Consumer reporting does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely regarding a decision for employment, government licensing, or a residential lease or tenancy involving a consumer, or to be used solely in any decision regarding the offering or provision of a product

or service that is not a consumer financial product or service.

(b) *Test to define larger participants.* A nonbank covered person that offers or provides consumer reporting is a larger participant of the consumer reporting market if the person's annual receipts resulting from consumer reporting are more than \$7 million.

§ 1090.105 Consumer debt collection market.

(a) *Market-Related definitions.* As used in this subpart:

Annual receipts means, for the consumer debt collection market, receipts calculated as follows:

(i) *Receipts* means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(ii) *Period of measurement.* (A) Annual receipts of a person that has been in business for three or more completed fiscal years means the total receipts of the person over its three most recently completed fiscal years divided by three.

(B) Annual receipts of a person that has been in business for less than three completed fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(C) Where a person has been in business for three or more completed fiscal

years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal or calendar years divided by the total number of weeks in the short year and the two full fiscal or calendar years, multiplied by 52.

(iii) *Annual receipts of affiliated companies.* (A) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(B) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts of the person and the affiliated company are aggregated for the entire period of measurement (not just the period after the affiliation arose).

(C) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (iii)(B) of this definition even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with paragraph (iii)(B) of this definition even if the person has been in business for three or more completed fiscal years.

(D) The annual receipts of a formerly affiliated company are not included if affiliation ceased before the applicable period of measurement as set forth in paragraph (iii)(B) of this definition. This exclusion of annual receipts of formerly affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(E) Annual receipts do not include receipts that result from the collection of debt that was originally owed to a medical provider.

Consumer debt collection is a debt collector's collection of debt incurred by a consumer primarily for personal, family, or household purposes and related to a consumer financial product or service.

Creditor means any person who offers or extends credit creating a debt or to

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whom a debt is owed, but such term does not include any person to the extent that the person receives an assignment or transfer of a debt in default solely for the purpose of facilitating the collection of debt for another.

Debt collector means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another. Notwithstanding the exclusion provided by paragraph (iii) of this definition, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. The term does not include:

(i) Any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(ii) Any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiv-

ing payments from such consumers and distributing such amounts to creditors;

(iii) Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity:

(A) Concerns a debt which was originated by such person; or

(B) Concerns a debt which was not in default at the time it was obtained by such person; and

(iv) Any person engaged solely in enforcing a security interest.

Test to define larger participants. A nonbank covered person is a larger participant of the consumer debt collection market if the nonbank covered person's annual receipts resulting from consumer debt collection are more than \$10 million.

[77 FR 65798, Oct. 31, 2012]

EFFECTIVE DATE NOTES: 1. At 77 FR 65798, Oct. 31, 2012, §1090.105 was added, effective Jan. 2, 2013.

2. At 78 FR , 2013, 77 FR 72913, Dec. 7, 2012 was amended in paragraph (iii)(C) of the definition of *Annual receipts*, remove the second reference to “(iii)(B)” and add “(ii)(B)” in its place; in paragraph (iii)(D) of the definition of *Annual receipts*, remove “(iii)(B)” and add “(ii)” in its place; add the paragraph designation “(b)” before “*Test to define larger participants*”, effective Jan. 2, 2013.